IN THE

Supreme Court of the United States

APRIL TERM, 1942

No. 267

CARLETON SCREW PRODUCTS COMPANY, A CORPORATION,
Petitioner (Defendant-Appellant below),

vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent (Plaintiff-Appellee below),

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Respondent (Plaintiff-Appellee below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner, Carleton Screw Products Company, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, to review a decree of that court entered April 22, 1942, affirming an order of the District Court for the District of Minnesota (4th division), dated March 28, 1941, which granted to the respondent a permanent injunction enjoining and restraining petitioner from claimed violations of the provisions of Section 7, Section 11 (c) and Section 15 (a) (1), (a) (2) and (a) (5) of the Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201, *et seq.*).

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This suit was brought by the respondent, administrator of the Wage and Hour Division, to enjoin petitioner from claimed violations of Sections 7, 11 (c) and 15 (a) (1), (a) (2) and (a) (5) of the Fair Labor Standards Act.

The complaint charged that since the effective date of the Act, November 24, 1938, petitioner had failed to comply with some of its provisions in that petitioner had not compensated its employees at one and one-half the *"regular rate"* at which they were employed for all overtime beyond the allowable time specified in the Act; that it had failed to keep records as required by the regulations issued under the Act. No question of minimum wages was involved, for the scale paid at all times was well in excess of specified minimums.

Petitioner's answer put in issue the allegations of the complaint and affirmatively alleged that it had fully complied with the requirements of the Act.

There was no dispute as to the basic facts. About two months prior to October 24, 1938, by agreement with its employees arrived at through several successive meetings between the management and the employees, the regular rate of pay for all employees was reduced 10¢ per hour. The petitioner agreed with its employees to pay this regular rate for all hours worked up to the allowable maximum; to pay time and one-half on that regular rate for all hours worked in excess of the allowable maximum; and if, by reason of this arrangement, employees failed to receive the same weekly earnings that they would have received for working the same number of hours as were in effect prior to the making of these arrangements and had the old rate remained in effect, the petitioner would add, as a bonus or gratuity, what-

ever small sum was necessary in order to maintain for the employees the same *weekly earnings* they had previously enjoyed; and the petitioner further agreed with the employees that if under the new regular rate, plus the overtime agreement, employees by reason of the number of hours worked should earn more than they earned under the old arrangement they would be compensated for all hours worked on the basis of the new regular rate of pay, plus time and one-half for all hours in excess of the allowable maximums.

After several meetings, and after full explanation of the plan, the employees accepted the arrangement, written contracts of employment specifying the terms were signed by all the employees, the plan was put into effect as of September 1, 1938, the Company's books were set up strictly in accordance with the agreement commencing with September 1, 1938, and the agreement was thereafter fully carried out by all the parties.

Testimony and exhibits upon the trial in the court below fully demonstrated the actual transactions. In the instance of at least three employees it was shown that enough hours were worked so that applying the new regular rate of pay, plus the overtime considerations, the employees earned and were actually paid more than they had earned prior to the change of rate, hence the petitioner was not required to make up, by way of bonus or gratuity, any amount to maintain the weekly earnings for those three (3) employees.

The employees accepted this agreement when they were informed by the firm that unless some agreement could be made with them to prevent a serious increased labor cost the petitioner would continue to maintain the old regular rate of pay after October 24, 1938, but would go to a straight forty-four (44) hour week instead of the 50 hour week they had been working, as the firm could not afford to maintain the old rate, maintain the same number of working hours,

and pay time and one-half at that old rate for the overtime hours. The employees realized that if a straight forty-four (44) hour work week were put into effect at the old rate of pay the weekly earning would be substantially reduced; hence the employees were willing to bargain with the employer and to arrive at this new workable agreement.

The Wage-Hour Division took the position that because the firm had guaranteed "weekly earnings" there had been, in fact, no change in the "regular rate of pay" notwithstanding the admitted testimony and exhibits; and claimed that the old regular rate of pay still remained as the basic rate, and that the firm should have paid time and one-half on the old rate.

The trial court found in favor of the Wage-Hour Division. Petitioner appealed to the Circuit Court of Appeals for the Eighth Circuit.

The Circuit Court of Appeals on March 20, 1942, rendered its opinion (Mandate filed April 22, 1942), affirming the decree of the lower court. The opinion of the Circuit Court of Appeals is found in 122 Fed. (2nd) (537), and copy is attached hereto.

In its written opinion the Circuit Court of Appeals admitted that the contentions of the petitioner were supported by the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Fleming (afterwards changed to Walling) vs. A. H. Belo Corporation,* 121 Fed. (2nd) 207, but refused to agree with the conclusions reached by the Fifth Circuit in the Belo Corporation case.

Since the decision of the Circuit Court of Appeals of the Eighth Circuit in this present controversy was rendered, the Supreme Court of the United States in the case of *Walling vs. A. H. Belo Corporation,* No. 622, decided and filed June 8, 1942, has affirmed the decision of the Fifth Circuit above referred to and has sustained the position and contentions

of the petitioner as to the requirements of Section 7 of the Fair Labor Standards Act with respect to overtime pay.

The petitioner respectfully states that the evidence and exhibits presented upon the trial in the court below bring your petitioner squarely and wholly within the conclusions of law found by the Supreme Court of the United States in the Belo Corporation case and that by reason thereof your petitioner is entitled to relief. That by reason of this subsequent decision of the Supreme Court of the United States in the Belo Corporation case, the decision of the Circuit Court of Appeals for the Eighth Circuit in this case is clearly in conflict with the applicable law as the same now exists. Petitioner further states that by an order of this court previously filed herein the time within which the petition might be filed was extended to August 1, 1942.

ARGUMENT AND REASONS FOR GRANTING WRIT.

The decision of the Circuit Court of Appeals involved a construction of Section 7 of the Act. The requirement of that section, for the purpose of this argument, is quoted as follows:

> "No employer shall * * * employ any employes * * * for a work week longer than forty-four hours * * * unless such employe receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the *regular rate* at which he is employed."

There was no conflict in the testimony that, prior to the effective date of the Act, the firm and the employees agreed upon a new basic *regular rate of pay* (10¢ per hour less than what had been previously paid). The firm agreed to pay time and one-half for all overtime hours upon that new rate of pay. The firm agreed to make up, by way of a bonus or gratuity, any differential that might arise by reason of the

change of the basic rate, and agreed to guarantee weekly earnings at the same amount as employees had previously enjoyed. And further, the firm agreed to pay whatever the new rate plus time and one-half for overtime on that rate would produce if the hours worked produced more earnings than would have been previously earned under the old rate. Prior to the making of this agreement all employees had worked at a straight wage with no overtime whatsoever.

In construing Section Seven (7) as above quoted, the Circuit Court of Appeals held that the "regular rate" upon which overtime had to be computed after October 24, 1938, was the agreed rate, plus the so-called bonus or gratuity paid at the end of each week and that the purpose of this so-called bonus or gratuity was to maintain the wage rate at the same level as existed at and prior to September 1, 1938; that the entire purpose of the plan was to escape paying overtime on the basis of that rate.

The situation disclosed in this case is identical in purpose and effect as was the situation sustained by the Supreme Court of the United States in the Belo Corporation case.

As stated by the Supreme Court in that case "nothing in the Act bars the employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equalled or exceeded the minimum required by the Act."

Further, in concluding its opinion in the Belo Corporation case this court said:

> "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours."
>
> *Walling vs. Belo Corporation*, No. 622, decided June 8, 1942.

Petitioner respectfully submits that the correct interpretation of Section Seven (7) as applied to the evidence in this case should have been favorable to your petitioner and not in accordance with the opinion of the Circuit Court of Appeals.

CONCLUSION.

For the reasons stated your petitioner prays that a writ of certiorari be issued to enable this court to review the decision of the Circuit Court of Appeals in this case.

July 21, 1942.

Respectfully submitted,

SAM J. LEVY,
Attorney for Petitioner,
2510 Rand Tower,
Minneapolis, Minnesota.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 12,123—MARCH TERM, A. D. 1942.

Carleton Screw Products Company, a corporation, Appellant, vs. Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee.	Appeal from the District Court of the United States for the District of Minnesota.

Before GARDNER, SANBORN and WOODROUGH, Circuit Judges.

GARDNER, Circuit Judge, delivered the opinion of the Court.

This was a suit brought by the Administrator of the Wage and Hour Division of the Department of Labor to enjoin the Carleton Screw Products Company from violating the provisions of Sections 7, 11 (c), and 15 (a) (1), (2), and (5) of the Fair Labor Standards Act (29 U.S.C.A., Sec. 201 et seq.). It will be convenient to refer to the parties as they were designated in the trial court.

The complaint charged that since the effective date of the Fair Labor Standards Act of November 24, 1938, defendant had failed to comply with its provisions in that it had not compensated its employees at one and one-half the regular rate at which they were employed for all overtime beyond the allowable maximum specified in the Act; that it had failed to keep records as required by the regulations issued under the Act. Defendant's answer put in

issue the allegations of the complaint and affirmatively alleged that it had fully complied with the requirements of the Act. The answer also challenged the constitutionality as applied to it.

The court found the issues in favor of the plaintiff and entered an injunctional decree as prayed. From the decree so entered, defendant prosecutes this appeal and seeks reversal on substantially the following grounds: (1) that the Fair Labor Standards Act does not apply to employers who are paying in excess of the minimum wages provided by Section 6 of that Act for the statutory workweek and one and one-half times that minimum for hours in excess thereof; and (2) that the regular rates of pay of defendant's employees are those shown on its payroll records, which rates were arrived at by agreement between it and its employees, and that proper overtime compensation based on such rates had been paid for all overtime hours.

There is no dispute as to the basic facts. Defendant manufactures, sells and distributes screws, brass sleeves, bushings, roller bearings, and similar screw machine products at its plant located in Minneapolis, Minnesota. Twenty-four per cent of its products are sold outside the State of Minnesota in general competition with the industry. It employs some eighteen workmen, who at the time the Fair Labor Standards Act of 1938 was passed, were working regular workweeks of fifty to fifty-six hours at rates of pay ranging from 45c to 80c an hour. In the late summer of 1938, following the enactment of the law, officials of the defendant discussed with a representative committee of its employees the wage and hour situation. It was represented to the employees that the earnings of the company were low and that a wage adjustment of some kind would have to be made in view of the Fair Labor

Standards Act. The employees were told that if time and one-half had to be paid on the then going rates of pay for hours in excess of forty-four per workweek, it would be necessary to run a straight forty-four hour week at the then existing wage rates but that the company desired to maintain the existing weekly earnings without reduction, and to bring about the desired result a plan was submitted which provided that the employees were to sign employment agreements setting forth agreed hourly rates of pay at 10c less than the employees were then receiving. The employees were further told that time and one-half based on the reduced rate would be paid for all overtime work in excess of forty-four hours, and if the total pay thus computed did not amount to as much as the employees would have received from the same number of hours, at the then prevailing hourly rate, the company would "add as a bonus or gratuity" at the end of each week such additional sum as might be necessary to guarantee to the employees the same weekly earnings they had theretofore received at the straight time hourly rate. The committee was requested to submit this plan to the employees. While some opposition and hostility developed with reference to the plan, it was finally accepted and the employees signed the employment agreements submitted by the company.

The avowed purpose of the plan was to keep within the provisions of the new wage and hour law and at the same time to maintain the employees' wages at the same level as they theretofore existed. The employees signed the agreements on the assurance that they would receive the same earnings thereafter as they had been receiving. The trial court was of the view and found that the regular rate of pay was that designated in the agreements, plus the so-called bonus or gratuity.

Under Section 7 of the Act, overtime must be compensated for at a rate not less than one and one-half times the regular rate at which the employee is actually employed. It is the contention of defendant that this provision is not applicable to it because it was paying in excess of the minimum wages provided by Section 6 of the Act. The general purpose of the Act, as expressed in Section 2, is to correct or eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." As indicated by recitals in the Act, Congress found that the existence of such conditions "(1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

Section 6 establishes a basic minimum wage which presumably Congress considered essential to the health, efficiency and well-being of employees engaged in interstate commerce, or in the production of goods for commerce. Section 7 provides that employees shall not be required to work longer than a specified number of hours per week "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." This provision imposes a penalty on overtime work regardless of what the rate of compensation may be, so that overtime work will be more expensive to the employer. The Act affects both

wages and hours. It does not absolutely prohibit employing workers longer than the stipulated minimum of hours, but requires extra pay for overtime, thus making overtime more costly to the employer.

Referring to Section 7 of the Act, the Supreme Court, in *United States* v. *Darby,* 312 U.S. 100, among other things, said:

"* * * the maximum hours of employment for employees 'engaged in commerce or the production of goods for commerce' without increased compensation for overtime, shall be forty-four hours a week."

The propriety of this method of regulating hours of work has the sanction of the Supreme Court. *United States* v. *Darby, supra; Olsen* v. *Nebraska,* 313 U.S. 236. We have held that the statute is remedial and must be liberally construed to effect its purpose. *Fleming* v. *Hawkeye Pearl Button Co.,* 8 Cir., 113 F.2d 52. To hold that the Act requires only the payment of the minimum wage specified in Section 6 for hours of work in excess of the maximum weekly hours set forth, would defeat the avowed purpose of the Act. Section 6 requires that employees engaged in the production of goods for commerce shall be paid wages during the six years next following the first year from the effective date of the Act, at rates not less than 30c an hour. It is observed that Section 7 does not fix a minimum wage for overtime, but requires that overtime shall be compensated for at a rate not less than one and one-half times the regular rate at which the employee is employed. The purpose of this section was recognized by the Supreme Court in *United States* v. *Darby, supra,* and *Olsen* v. *Nebraska, supra.* We think it clear that Section 7 is a regulation of hours, and that the regular rate is not the minimum rate but is the rate which the employee is actually paid.

Defendant's contention finds some support in the case of *Fleming* v. *A. H. Belo Corporation*, 5 Cir., 121 F.2d 207. It was held in that case that Section 7 merely prescribed a fixed minimum rate at which hours in excess of the statutory maximum must be compensated, and that by contract the employer and employee might provide for compensation for overtime hours in excess of that minimum without violating Section 7. By this construction, Section 6 is a limitation on Section 7. We are not persuaded that this decision correctly construes these provisions of the statute, and we think it is not sustained by the weight of authority.

This same question was recently before the Sixth Circuit Court of Appeals in *Bumpus* v. *Continental Baking Co.*, ____ F.2d _____. In the course of the opinion in that case the court said:

"The principal question presented, therefore, is whether Section 6 so limits and controls Section 7 that an employee whose compensation equals or exceeds the applicable minimum rate for each of the applicable maximum hours permissible without increased compensation, and in addition exceeds one and one-half times the minimum rate for each hour over that maximum number, is not entitled to additional compensation for overtime under Section 7. The correlative question is whether the words 'regular rate at which he is employed' mean the minimum rate prescribed by Section 6. If the sole purpose of Section 7 is to eliminate substandard wages, and if it is controlled by Section 6, the judgment was correct. If, however, the purpose of Section 7 is to regulate hours of labor and to eliminate excessive hours by requiring the employer to pay time and a half for overtime at the regular rate paid the employee even though he is paid more than the minimum set in Section 6, then the judgment was erroneous. We think that the judgment of the District Court must be reversed. The wording of Section 7 is unqualified and forbids the employment of 'any * * * employees * * * engaged in commerce or in the pro-

duction of goods for commerce' longer than a specified workweek unless such employee receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the regular rate at which he is employed. Title 29 U.S.C., Section 207. The words 'minimum wage' or 'minimum rate' are not found in Section 7. The unmistakable meaning of the language used is that employment for more than the statutory maximum number of hours is intended to entail additional expense to the employer no matter what the regular rate of employment may be unless the employee falls within one of the exempted groups there listed. * * * *

"We conclude that the appellant is entitled to receive overtime payments at the regular rate at which he was employed regardless of the fact that the contract entitled him to substantially more than the minimum wages set by Section 6. This conclusion is in accord with the great weight of authority upon this question. *Du Bois Soap Co.* v. *Floyd*, 4 Wage Hour Report, 541 (Ct. App., Ohio); *St. John* v. *Brown*, 38 Fed. Supp. 385 (N.D. Texas); *Williams* v. *General Mills*, 39 Fed. Supp. 849 (N.D. Ohio); *Emerson* v. *Mary Lincoln Candies*, 174 Misc. 353, aff'd, 261 App. Div. 879; *Thornberg* v. *Eastern T. & W. N. C. Motor Transportation Co.*, 3 Wage Hour Report, 534 (Sup. Ct. Tenn.); *Sunshine Mining Co.* v. *Carver*, 41 Fed. Supp. 60 (D.C., Idaho). Contra: *Missel* v. *Overnight Transportation Co.*, 40 Fed. Supp. 174 (D.C., Md.)."

See, also, *Missel* v. *Overnight Transportation Co.*, 4 Cir., ---- F.2d ----.

We conclude that the Act is not limited in its effect to employees receiving less than the minimum wage prescribed.

It is necessary to determine what was the regular rate of compensation. The trial court found that the regular rate was the agreed rate, plus the so-called bonus or gratuity paid at the end of each week. The purpose of this so-called bonus or gratuity was to maintain the wage rate at the same level as existed at and prior to Septem-

ber 1, 1938. The entire purpose of the plan was to escape paying overtime on the basis of that rate. The bonus has none of the earmarks of a bonus, but it was in fact a part of the employees' regular compensation. Neither the employer nor the employee regarded this payment as a gift or a gratuity. There was no agreement between the employer and the employees to reduce the wage rate. It is worthy of note that when the standard workweek fixed by the Act changed from forty-four to forty-two hours on October 24, 1939, and to forty hours on October 24, 1940, the amounts entered in the books of the company as "bonuses," decreased uniformly because the amount shown as overtime compensation had to be increased. The so-called bonus was paid pursuant to a contractual obligation, and it was considered as part of the regular compensation and not as a gratuity. It follows that defendant's records were not so kept as to show the correct regular rate of pay of its employees and overtime compensation based on such rates in conformity with the regulations prescribed under this Act.

Defendant challenges the constitutional validity of the Act in that it is an unreasonable restraint upon the liberty of contract in violation of the Fifth Amendment; that its regulation of hours constitutes an unconstitutional usurpation of power by Congress, which can not be sustained under the Commerce Clause of the Constitution, and that the exemptions in the Act are such as to deny defendant the equal protection of the law. The liberty of contract guaranteed by the Constitution is not an absolute one, but is a freedom from arbitrary restraint, rather than an immunity from reasonable regulation imposed in the interest of society. Congress may constitutionally deny the liberty of contract to the extent of forbidding or regulating every contract which is reasonably calcu-

lated to affect injuriously the public interests. It may deny the right to contract in violation of the established law. For example, a common carrier or shipper can not legally contract for the transportation of goods or property in interstate commerce at a rate other or different from that specified in the approved published tariffs of the carrier, nor can it contract for preferences or rebates. Neither may individuals in the United States enter into a legal contract for the purchase or sale of lottery tickets. The constitutional right of contract may not be invoked in support of a supposed right to make or enter into any contracts which are illegal, and Congress may constitutionally regulate the making or performance of contracts where reasonably necessary to effect the purposes for which the National Government was created, such as the regulation of interstate commerce. *Highland* v. *Russell Car & Snow Plow Co.*, 279 U.S. 253; *Virginian Ry. Co.* v. *System Federation No. 40 R.E.D.*, 300 U.S. 515; *Philadelphia B. & W. R. Co.* v. *Schubert*, 224 U.S. 603; *Northern Securities Co.* v. *United States*, 193 U.S. 197.

It is also urged by defendant that the Act denies it the equal protection of the law, guaranteed by the Fourteenth Amendment. The guaranty of equal protection embodied in the Fourteenth Amendment, however, is a restriction on the state governments and not upon the Government of the United States. At most the guaranty of equal protection, whether embodied in the Fourteenth or the Fifth Amendment, means that no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes in like circumstances. Equal protection, however, permits classification which is reasonable and not arbitrary. The statute here assailed affords like treatment to all similarly situated, and hence, does not deny equal protection of the law.

These contentions of defendant, we think, are without merit. *United States* v. *Darby, supra; Opp Cotton Mills* v. *Administrator,* 312 U.S. 126; *Florida Fruit & Produce Co.* v. *United States,* 5 Cir., 117 F.2d 506.

The decree appealed from is therefore

Affirmed.

A true copy.

Attest:

(Seal) E. E. KOCH

Clerk, U. S. Circuit Court of Appeals, Eighth Circuit.

No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1942

CARLETON SCREW PRODUCTS COMPANY, A CORPORATION, PETITIONER

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI, MOTION TO SUBSTITUTE, AND MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 267

CARLETON SCREW PRODUCTS COMPANY, A CORPORATION, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, agrees that this petition for a writ of certiorari should be granted and that the case should be set down for argument.

The issue here is whether the regular rate of pay, upon which overtime compensation is to be computed under Section 7 of the Fair Labor Standards Act, 52 Stat. 1060; 29 U. S. C., sec. 207, includes the "bonus" through which petitioner brought the employees' compensation up to their former straight-time hourly rate.

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Petitioner manufactures screw machine products and has about 18 employees, all of whom are engaged in producing goods for commerce (R. 425–426). They work from 50 to 56 hours a week (R. 426–427). Prior to the effective date of the Act they were paid from 45 to 80 cents an hour (R. 383, 418). Shortly after the passage of the Act petitioner stated to its employees that it could not pay overtime at time and a half, and that it would have to reduce the workweek to 44 hours unless the employees agreed to the following arrangement: hourly rate would be reduced by 10 cents, while petitioner would pay a weekly bonus sufficient to equal the difference between the old straight-time rate times the number of hours worked and the reduced rate with time and one-half after 44 hours (R. 428–430).[1] This proposal was accepted by the employees with reluctance and after considerable hesitation (R. 428–429). It had the effect of permitting petitioner to continue paying straight time at the old rates, and was purely a bookkeeping arrangement (R. 430–431). The employees computed their earnings just as

[1] The bonus would almost invariably be necessary. The 45-cent employee would have to work 102.7 hours at 35 cents with time and a half after 44 to equal his old straight-time earnings ([44 x $0.35=$15.40]+[58.7 x $0.525=$30.82]=$46.22; 102.7 x $0.45=$46.22) and the 80-cent employee would have to work 61.6 hours at 70 cents with time and a half after 44 to equal his old straight-time earnings ([44 x $0.70=$30.80]+[17.6 x $1.05=$18.48]=$49.28; 61.6 x $0.80=$49.28).

they always had done, without regard either to the reduced rate or to overtime (R. 429–430). The courts below held that the "bonus" must be included in determining the regular rate of pay on which overtime compensation must be computed under Section 7 of the Act and enjoined further violations (R. 431, 434–435, 450, 452).

The case is controlled neither by *Walling* v. *A. H. Belo Corp.*, No. 622, last Term, nor by *Overnight Transportation Co.* v. *Missel*, No. 939, last Term and its decision by this Court will measurably clarify the serious administrative and industrial problems raised by the two decisions. See Petition for Rehearing, *Walling* v. *A. H. Belo Corp.*

Perhaps the most significant difference between this case and the *Belo* case is that the employees here were hired at hourly, not weekly rates. The petitioner was not, as this Court viewed the Belo Corporation, seeking to assure a steady income to its employees who worked a fluctuating number of hours each week. It continued to pay the same hourly rate as before the Act, but through a bookkeeping device agreed upon with the employees avoided the payment of overtime.

This case differs also from the *Belo* case in its posture before this Court. The *Belo* plan was presented here on the basis of findings that the arrangement was *bona fide* and operated to the

mutual satisfaction of all parties. Here, in contrast, the trial court found that the contractual rate "was merely a bookkeeping device" (R. 430) and the circuit court of appeals agreed (R. 450). Both courts below found that the so-called "bonus" was in reality a part of the employees' regular compensation and must be included in the regular rate of pay (R. 431, 450). Both courts below found that the parties did not in fact set a new regular rate of pay and that the purpose of the contracts was to pay the same hourly rate as before the effective date of the Act without the necessity of paying overtime as required by Section 7 of the Act (R. 429, 431, 450). Finally, the plan here did not represent the mutual satisfaction of employer and employees but was accepted by the latter after much hesitation and only because the employer stated that otherwise he would reduce the hours of work to forty-four (R. 428–429, 446).

The present case, on the other hand, also differs from the *Missel* case in that here the employer and his employees signed a contract which purported to set a prescribed hourly rate as the regular rate of pay. If that decision were in truth to apply only where the contractor had neglected to obtain contractual consent to the avoidance of Section 7, the present case might be thought to fall within an extended application of the *Belo* case.

In these circumstances we agree that the writ should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, United States Department of Labor.

AUGUST 1942.